

PROSECUTOR “ERROR” FAST FACTS

JUSTICE – IT IS WHAT WE DO!

Imbedded in our duty as prosecutors is the higher calling of justice. As the U.S. Supreme Court observed, prosecutors have a special responsibility in the justice system, a duty to be impartial – not trying to win a case, but to see that justice is done.

The Arizona Prosecuting Attorneys’ Advisory Council has adopted a mission statement that emphasizes justice above all to underscore the philosophy of our criminal justice system: **Empowering Arizona’s prosecutors to administer justice and promote public safety through training and advocacy.**



Our **worst nightmare** is convicting an **innocent** person. A wrongful conviction is an injustice to the person convicted and the victim and undermines faith in the system, not to mention leaving the criminal free to commit more crimes.

By rejecting cases that lack sufficient evidence, prosecutors in effect “exonerate” defendants regularly. We are critical partners in post-conviction exonerations.

Arizona Courts said, “[P]rosecutorial misconduct ‘is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial.’”

Prosecutorial error and prosecutorial misconduct are not synonymous. “There is an important distinction between simple prosecutorial error, such as an isolated misstatement or loss of temper, and misconduct that is so egregious that it raises concerns over the integrity and fundamental fairness of the trial itself. Misconduct alone will not cause reversal; a new trial should not be granted to punish counsel for his misdeeds, but (only) where the defendant has been denied a fair trial as a result of the actions of counsel.”

A National District Attorneys’ Association (NDAA) estimate, which is based upon Department of Justice figures, from 1989 through 2012, reveals approximately **24 million felony convictions in the U.S.** The 1000+ exonerations is roughly **.00004 (or .004%)** or one out of 25,000 felony convictions. The actual percentage must be even lower – the Registry lists exonerations back to 1989, but the convictions that led to the exonerations go back to 1959, increasing the base number of convictions. **Surely, few professions can claim such a rate of accuracy.**

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DEFINING THE TERMS

In criminal law, there are unlimited fact patterns, which are tested for the truth under rules and laws that framework is constantly evolving in response to the unforeseen situations that unfailingly arise. It makes sense that no one is going to be perfect. Numerous levels of appellate review grapple with the difficulties of applying rules and laws to unusual facts. In spite of this, as noted, prosecutors actually have an amazing track record, especially if you parse those incidents that are clearly errors (both sides are bound to make mistakes) versus mindful misconduct.

ERROR: The word misconduct itself carries a social stigma with it that should only be placed on a prosecutor whose behavior rises to a certain level such as committing an ethical violation and not to one who makes a misstep of a type all trial lawyers make from time to time.

ACCOUNTABILITY: The dearth of disciplinary cases is attributable in no small part to the continuing training APAAC and individual offices provide together with other checks and balances; our top prosecutors are elected and thus responsible to the very people that the line prosecutor has sworn to protect.

Those who choose this line of work are for doing good (it is certainly not for the money). That is not to say that we have had no outliers; to be sure, there are some difficult examples. The very nature of the job presents challenges to the sturdiest among us and to that end; we are becoming more cognizant of the need to care for our own well-being as part and parcel of maintaining a healthy ability to perform.

ETHICS: Prosecutors, unlike all other attorneys, are held to a higher standard in our disciplinary rules. See Arizona Rules of Professional Conduct Rule 42, E.R. 3.8 “Special Responsibilities of a Prosecutor.”

Certainly there are many cases of ineffective assistance of council but defense misconduct is euphemistically called ineffective and does not perennially get bandied about like the far more intriguing “prosecutorial misconduct.”

At APAAC and throughout our membership ethical behavior is top on our list and indeed, runs through all of the training programs we offer.

VICTIMS: As the main group that interfaces with the victims, it can be difficult for prosecutors when the laws and rules appear to cut in favor of the defendant, but the overarching concept of justice remains the focus. Our training programs remind prosecutors to be wary of the pitfalls of tunnel vision and other such challenges. Risking retrial through same misconduct is a tough thing to face when you have to look a victim in the eye and tell her we have to do it all again. Interaction with the victim makes the risk of retrial a pretty high stake.

The American Bar Association and NDAA resolved, that “prosecutorial misconduct” [is] a term of art in criminal law; used to describe government conduct that violates a defendant’s rights. Whether or not that conduct was or should have been known by the prosecutor to be improper. In addition, whether or not the prosecutor intended to violate the Constitution, or any other legal or ethical requirement.

The resolutions urge trial and appellate courts to use the term “error” when reviewing the conduct of prosecutors while assuring that a defendant’s rights are fully protected, where it more accurately characterizes that conduct than the term “prosecutorial misconduct.”

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THE BIG QUESTION?

**The question is often framed as:
“Does the current prosecutorial system encourage these ‘ethical people’ to remain ethical as prosecutors, and if not, how can it be reformed?”**

Concerns about misconduct are rooted in pressures to convict, through emphasis on conviction rates (not the Arizona culture) or a vague, powerful moral justification for “zealous” representation of “*the people*” and “*the victims*,” obscuring a prosecutor’s personal agency, and depersonalizing the defendant.

In fact, Arizona is making great advances with evidenced-based probation and parole decisions, drug courts and other specialty courts and through adoption of modern law enforcement techniques.

The facts in Arizona are:

- Allegedly, unethical behavior occurs by accident, or through the application of poorly written or archaic rules, but Arizona has an aggressive rule amendment process and nearly every year is fine-tuning its criminal statutes and rules when clots in the flow of justice appear.
- Prosecutors are in the best position to fix prosecutors by implementing voluntary internal reforms and we are doing so through the independent training offered through APAAC national level resources and our accountability to the public and victims.
- We analyze the cases citing misconduct and through intensive training bring attention to cognitive bias, etc. in order to get well-intentioned prosecutors thinking more broadly about their choices.



Arizona Innocence Project

In 2012, the Arizona Justice Project/Innocence Project alleged Prosecutorial Misconduct in a number of Arizona cases; however, those claims were analyzed and refuted:

40 cases apparently resulted from a standard Westlaw search on the term “prosecutor misconduct”:

20 merely included discussion of alleged misconduct in the opinion but it was not part of the holding [at least one was included based only on the Westlaw headnote]

20 cases had prosecutorial error:

15 harmless errors;
5 significant misconduct:
3 from U.S. District Court;

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Evidence is often a point of contention in criticizing the conduct of prosecutors.

SCIENTIFIC EVIDENCE AKA FORENSICS

As much as anyone in the judicial system prosecutors, rely on the adversary system and the rules to test the veracity of all evidence. A 2009 analysis of 225 overturned convictions netted 116, which were allegedly because of improper/invalidated forensic science.

That Innocence Project report claims that convictions later overturned based upon DNA testing were the result of the prosecutor’s purposeful use of un-validated or improper forensic evidence at trial.

- Use of disciplines that were not inherently reliable (i.e. bite mark analysis)
- Inaccurate testimony about forensic evidence, i.e. as faulty statistics
- Fabricated inculpatory or undisclosed exculpatory evidence

The court addressed forensics through the adoption of amendments to Rule of Evidence 701-6, effective January 2012, strengthening the role of the judge as the gatekeeper for dependable science.



To be sure, prosecutors must be at their best when dealing with issues of science and witnesses who will be addressing this highly technical material, but the prosecutor should be able to grapple with the material more efficiently than the jury who must be convinced. Prosecutors must have a strong awareness and knowledge of the scientific method and forensic science disciplines. See, American Academy of Forensic Sciences, 2009 position statement responding to the National Academy of Sciences report recommending upgrades to the forensic sciences in the US. Obviously, that does not include having a crystal ball to determine ahead of all others that an entire discipline is unreliable, any more than that would be an expectation of the defense bar.

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ARIZONA FORENSIC SCIENCE ACADEMY:

APAAC is one of the proud sponsors of the Forensic Sciences Academy, which embodies Arizona’s Forensic Sciences Advisory Committee almost immediate response to the NAS report since 2010. The coursework provides in-depth, science-based training not only to prosecutors and law enforcement officers but also to defense attorneys and others. This broad audience will help ensure that every component of the system has access to the most advanced tools for enhancing public safety in our community.

The Academy, apparently the only one of its kind in the nation, features a curriculum that includes crime scene investigation, toxicology, DNA, latent print analysis, firearms, ballistics, pathology, trace evidence and digital forensics, was featured in Forensic Science Magazine in January 2012. It has also been featured in Webinars and spun off an alumni association.

Now, in its fourth academic year, the impact of the training afforded line prosecutors and others is becoming exponential. Educating nearly 40 individual attorneys in each academy not only edifies the participants but allows them to return to their work environment and share their knowledge with their peers. The 150th trainee is currently enrolled. Moreover, demonstrating adequate command of the scientific evidence in the courtroom improves the process overall and will likely have a substantial impact on the appellate activity that arises out of technical issues.

EYEWITNESS IDENTIFICATION

As prosecutor’s we are fully engaged in the legal concepts behind the defendant’s rights, including those of the 6th Amendment, safeguarding the confrontation with one’s accuser through vetting the evidence before a jury. We also know that in testing the facts at trial, the evidence does not always lead directly to the truth. Sometimes it happens that a witness is indeed mistaken.

- The RAJI’s require the state to prove the reliability of an in-court identification of the defendant beyond a reasonable doubt. Yet, scientific studies have shown that some methods of eliciting and preserving eyewitness testimony are not as efficacious as we would presume; the main factors are initial discrepancies in the eyewitness description, initial non-identification and suggestive line-ups. In other words, the most common cause is the human factor; memories are not perfect; hence the jury instruction.
- Supplementing the defendants’ right to confront the accuser and cross-examine all witnesses as well, as to present evidence and witnesses of their own, the court may grant a “Dessureault” hearing if there is suspicion that an eyewitness’ testimony is tainted.
- Social science research is constantly informing both the lawyers and law enforcement about how to avoid suggestive identification procedures.
- *AZ Post Eyewitness Identification, False Confessions* providing the most recent science as a continuing training to Arizona’s Peace Officers is distributed to all agencies across the state for training credit for certified officers. Although not mandatory, the program has a high level of participation statewide.

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THE TEXAS CONVERSATION

A recent exchange in Texas between the Innocence Project’s Barry Scheck and Shannon Edmonds of the Texas District and County Attorneys’ Association is directly relevant to Arizona.

Both agree that actual, intentional prosecutorial misconduct is exceedingly infrequent.

- Scheck argues it is like a bridge collapse – rare, but still needing to be investigated, understood, and prevented: traditional self-monitoring/judicial monitoring processes don’t work and calls for “better” internal systems to deal with misconduct, greater discipline by bar associations, better judicial reporting of misconduct/systems for addressing those reports and creating an independent state agency with the authority and resources to investigate. (A cost/benefit analysis is not part of his recommendation).
- Edmonds notes that given the rarity, calls for reform on the already regulated prosecution side create a red herring; in fact, there are virtually no blocks to defendants’ allegations of misconduct resulting from the appellate review of a large percentage of cases which have an “error” rate of less than 1/3600 (even using a very broad definition of misconduct that may not involve a prosecutor or misconduct, i.e., evidence discovered after the trial, etc.).

SOURCES

State v. Aguilar, 217 Ariz. 235, 238-239, 172 P.3d 423, 426-427 (App. 2007) quoting *Pool v. Superior Court*, 139 Ariz. 98, 108-109, 677 P.2d 261, 271-272 (1984)

State v. Minniti, 203 Ariz. 431, 438, 55 P.3d 774, 781 (2002) (citing *Pool v. Superior Court*, 139 Ariz. 98, 105-107, 677 P.2d 261, 268-270 (1984))

State v. Sustaita, 119 Ariz. 583, 592-593, 583 P.2d 239, 248-249 (1978).

Berger v. United States (1935) 295 U.S. 78, 88.

Cummings, Lawton P. 2139 CARDOZO LAW REVIEW [Vol. 31:6 2010]

Burke, Alafair S. Talking About Prosecutors 2119 CARDOZO LAW REVIEW [Vol. 31:6 2010]

May 6, 2012: Errant Prosecutors Seldom Held to Account by Barry Scheck

<http://www.statesman.com/opinion/insight/errant-prosecutors-seldom-held-to-account-2342079.html> and Prosecutors Rarely go Wrong, Should not be Hindered by Shannon Edmonds <http://www.statesman.com/opinion/insight/prosecutors-rarely-go-wrong-should-not-be-hindered-2342115.html#T6wWlAcA6P8.email>

Garrett, Brandon L., *Convicting the Innocent: Where Criminal Prosecutions go Wrong* (Harvard University Press, 2011).

State v. Nottingham, 231 Ariz. 21 (App. 2012) State Bar of Arizona, Revised Arizona Jury Instructions (Criminal) Std. 39 (3d ed. 2008).

State v. Dessureault, 104 Ariz. 380 (1969)

The Effect of Suspect-Filler Similarity on Eyewitness Identification Decisions: A Meta-Analysis. 19 *Psychology, Public Policy, and Law* 151 (2013), Ryan J. Fitzgerald, Heather L. Price, Chris Oriet, & Steve D. Charman;

Identity-Lineup Location Influences Target Selection: Evidence from Eye Movement. Ahmed M. Megreya, Markus Bindemann, Catriona Havard & A. Mike Burton. 27 *J Police Crim Psych* 167 (2012);

Eyewitness Misidentification: Single vs. Double-Blind Comparison of Photo Spread Identification. Arthur H. Perlino, Andrew D. Silvaggio. 100 *Psychological Reports* 247 (2007)

www.NDAA.org/pdf/prosecutorial_misconduct_final.pdf, *State v. Leutschaft* 759 NW 2d 414 (2009) MN App.